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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY C. ROMERO

Defendant and Appellant.

2d Crim. No. B235902  
(Super. Ct. No. 2011011612)  
(Ventura County)

Anthony C. Romero ("Romero") appeals from the judgment following his convictions of carrying a loaded firearm and street terrorism. He challenges the legality of the search that revealed the firearm, and the sufficiency of the evidence underlying the street terrorism conviction. Neither claim has merit, and we affirm.

*FACTS AND PROCEDURAL HISTORY*

*I. The Firearm Count and Suppression Motion*

On the afternoon of April 2, 2011, Oxnard Police Officer Gordon Currie saw Romero riding his bicycle on the sidewalk. This violated the Oxnard Municipal Code and is punishable by a fine. Immediately after pulling over and getting out of his patrol car to talk to Romero, Officer Currie noticed that Romero had a "dry mouth," and saw from the veins in Romero's neck that he had a rapid heart rate. Officer Currie recognized both symptoms as possible signs of drug use.

Officer Currie asked Romero for permission to pat him down, and Romero agreed. During the patdown, Officer Currie could feel Romero's rapid heartbeat through his clothing and also noted that his eyes were bloodshot and his tongue coated. These were further symptoms of drug use. Officer Currie next asked Romero two or three times for permission to search the backpack Romero wore, but Romero refused.

Officer Currie then directed Romero to sit on the curb. Because Romero had said he had been riding home from a gym workout, Officer Currie decided to wait a few minutes before conducting any drug recognition tests. This way, he could be sure that any negative results were due to drug use and not Romero's recent physical activity. Officer Currie spent a few minutes filling out a field identification card on Romero before administering drug recognition tests. The tests confirmed Officer Currie's earlier observations. He then arrested Romero for being under the influence "of a CNS stimulant, possibly poly use." Up to this point, the encounter had lasted at most 20 minutes.

Officer Currie then searched Romero's backpack. Among other things, he found a loaded, Bryco .32-caliber handgun with a round in the chamber and a full magazine, and a second fully loaded magazine. Back at the police station, Romero submitted to a presumptive urine test that came back negative for four drugs—cocaine, THC, opiates and methamphetamine.

Romero moved to suppress the gun. After an evidentiary hearing at which Officer Currie and Romero both testified, the trial court denied the motion. The court ruled that Officer Currie lawfully seized the gun as the fruit of a search incident to arrest. The court found Romero's arrest lawful under two alternative theories: (1) Officer Currie had probable cause to arrest Romero for the bicycle violation; and (2) Officer Currie had developed probable cause to arrest Romero for drug use while observing him during their initial, consensual encounter.

## *II. The Street Terrorism Count*

At trial, Romero repeatedly denied membership in the Oxnard-based Colonia Chiques street gang. The State offered the testimony of a gang expert who opined that Romero was an active member of that gang, despite his denial.

The expert noted that Romero had been seen by police four times in the last two years wearing multiple items of clothing bearing a five-pointed star, which is a symbol of the Colonia Chiques gang. Romero admitted on the stand that he was not a fan of any of the sports teams whose star-themed emblems he wore. Romero also had a tattoo across his chest bearing the letters "Cal" in cursive script, which is another symbol associated with the Colonia Chiques gang. Romero acknowledged that a non-gang member bearing such a tattoo would be beaten for doing so.

Between 2001 and 2010, Romero had been seen with, and in 2007 had admitted to "hanging out" with, other Colonia Chiques gang members. Moreover, when Officer Currie asked him about any gang affiliation, Romero said he was "from the area" and "kn[e]w some people." Romero had also been involved in two fist fights with members of a rival gang, and in three incidents in 2005 when he shouted out gang-related messages. Police found Colonia Chiques gang graffiti in Romero's room in 2004 and again in 2006. Romero also admitted to having the moniker "Scar," and police had found this moniker amidst Colonia Chiques gang graffiti in 2007.

The gang expert further opined that gang members had "a duty" to assault rival gang members, often with guns. The expert stated that such assaults were committed "for the gang" because they enhanced the gang's reputation for strength.

## *DISCUSSION*

### *I. The Trial Court Properly Denied the Motion to Suppress*

In reviewing the trial court's suppression motion, we "' . . . defer to the trial court's factual findings . . . where supported by substantial evidence . . .," but

evaluate the reasonableness of the search or seizure independently. (*People v. Weaver* (2001) 26 Cal.4th 876, 924.)

We hold that each of the trial court's alternative rationales for upholding the search of the backpack is consistent with the Fourth Amendment. Our Supreme Court in *People v. McKay* (2002) 27 Cal.4th 601, 617-618, held that a search incident to an arrest for a fine-only offense is valid under the Fourth Amendment. There is no dispute that Officer Currie had probable cause to believe Romero violated the Oxnard bicycling law. Officer Currie's decision not to arrest Romero immediately did not negate that probable cause or otherwise invalidate the search of the backpack, which was contemporaneous with the arrest itself.

The trial court also acted correctly in concluding, in the alternative, that the gun was lawfully seized in a search incident to arrest for drug use. Officer Currie's observations supplied sufficient probable cause to believe Romero was under the influence of narcotics. Moreover, Officer Currie made those observations lawfully. The encounter was consensual until Officer Currie directed Romero to sit on the curb (*In re Manuel G.* (1997) 16 Cal.4th 805, 821), and the officer's observations up to that point in time provided reasonable suspicion to justify detaining Romero for further investigation.

In addition to disputing generally the trial court's alternative rationales, Romero raises three other arguments. He contends that Officer Currie's search is invalid because he turned out to be wrong about Romero's drug use. However, probable cause turns on "a probability or substantial chance of criminal activity, not an actual showing of such activity." (*Illinois v. Gates* (1983) 462 U.S. 213, 243, 245 at fn. 13.) "[A] finding of probable cause may not be defeated by an after-the-fact showing that the information . . . provided was mistaken. [Citations.]" (*Arizona v. Evans* (1995) 514 U.S. 1, 17.)

Romero next asserts that Officer Currie's suspicions about drug use were a little more than a pretext for searching Romero's backpack. Officer Currie's

subjective motivations are irrelevant to any Fourth Amendment analysis. (*Whren v. United States* (1996) 517 U.S. 806, 813.)

Romero lastly posits that a court may not justify the search as incident to an arrest for the bicycling violation because Officer Currie did not arrest him for that violation. In Romero's view, there was accordingly no arrest and, under *Knowles v. Iowa* (1998) 525 U.S. 113, could not be a search incident to arrest. *Knowles* itself is inapplicable because Romero was, in fact, arrested. More to the point, Officer Currie's contemporaneous reason for the arrest is irrelevant to the Fourth Amendment analysis. Reviewing courts are to uphold an arrest on *any* valid, objective basis appearing in the record—even if it is not the one the arresting officer actually entertained. (*Devenpeck v. Alford* (2004) 543 U.S. 146, 153-154). The record here discloses probable cause to arrest Romero for the bicycle offense. The trial court properly denied the suppression motion.

## II. *The Street Terrorism Conviction Is Supported By Substantial Evidence*

The crime of street terrorism has three elements: "(1) active participation in a criminal street gang . . . ; (2) knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and (3) the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang. [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 56 (*Albillar*); Pen. Code, § 186.22, subd. (a).)<sup>1</sup> On appeal, Romero attacks the sufficiency of the evidence on the first and third elements. We "" . . . review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.]" [Citation.]" (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1508 (*Garcia*).)

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<sup>1</sup> All statutory references are to the Penal Code.

*A. Active participation*

Romero claims the State did not present sufficient evidence to support the jury's finding that he "actively participated" in the Colonia Chiques gang. "Active participation" is defined as "involvement with a criminal street gang that is more than nominal or passive." (*People v. Castenada* (2000) 23 Cal.4th 743, 747 (*Castenada*)). Romero's contentions boil down to two assertions: (1) most of the State's evidence has an innocent explanation; and (2) most of that evidence is too old to show any recent gang involvement. Romero's first argument does not invalidate his conviction because the jury was entitled to reject his competing explanations and to credit the gang expert's. Nor were Romero's gang ties categorically stale. Romero wore gang clothing on the date of the offense and had worn it at least three other times in the last two years. Romero admitted to obtaining the "Cal" tattoo in the last year. Additionally, he told Officer Currie that he was "from the area" and knew "some people." Under the deferential standard we apply, this is sufficient evidence of gang involvement "at or near the time of the [current] crime" (*Garcia, supra*, 153 Cal.App.4th at p. 1509) to support the jury's finding of this element.

*B. Willful promotion, furtherance or assistance*

Romero also claims that the State presented insufficient evidence to support a finding beyond a reasonable doubt that he willfully promoted, furthered or assisted any felonious conduct by gang members.

Romero's primary contention is that his offense of carrying a loaded firearm was not "gang related." We reject this argument because "gang related[ness]" is not always an element of street terrorism. (*Albillar, supra*, 51 Cal.4th at p. 55.) Even if it were, the gang expert testified that Romero's conduct in openly wearing gang paraphernalia while carrying a loaded, unregistered firearm enhanced and promoted his gang. This is sufficient evidence of gang-relatedness to support his conviction. (*Accord People v. Salcido* (2007) 149 Cal.App.4th 336,

367-368 (*Salcido*) [affirming street terrorism conviction premised on acts of carrying a knife and gun].)

Our lingering concern with this element is that Romero acted alone. Courts of Appeal are split on whether a gang member acting alone can be convicted of street terrorism. One court has held: No, never. (*People v. Rodriguez* (2010) 188 Cal.App.4th 722, 726-727, 735, review granted, Jan. 12, 2011, S187680, quoting *Castenada, supra*, 23 Cal.4th at p. 752.) It based its conclusion on language in *Castenada* that "every person incurring criminal liability" for street terrorism "has aided and abetted a separate felony committed by gang members." (*Ibid.*) Other courts have held: Yes, but only if the crime is gang related. (*People v. Anguiano* (2012) 210 Cal.App.4th 323; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930-931; *Salcido, supra*, 149 Cal.App.4th at pp. 367-368; *People v. Nguon* (2001) 88 Cal.App.4th 432, 434.) Still other courts have held: Yes, even if not gang related—although, in each of these cases, the evidence suggests the crimes were gang related. (*People v. Gonzales* (2011) 199 Cal.App.4th 219, 231, review granted Dec. 14, 2011, S197036; *People v. Cabrera* (2010) 191 Cal.App.4th 276, 285-286, review granted Mar. 23, 2011, S189414; *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1306-1307 (*Sanchez*).)

Until the Supreme Court resolves this split and provides further guidance, we disagree with the view that a lone defendant may *never* commit street terrorism. That view is not compelled by *Castenada*. The defendant in *Castenada* acted alongside other gang members (*Castenada, supra*, 23 Cal.4th at p. 745), so *Castenada* did not squarely confront the issue of a solitary defendant's culpability. (*People v. Harris* (1989) 47 Cal.3d 1047, 1071 ["a decision does not stand for a proposition not considered by the court"].)

More to the point, the view that a solitary defendant cannot commit street terrorism is inconsistent with the language and purpose of the street terrorism statute. The Legislature sought to make "gang participation itself a substantive crime" (*Salcido, supra*, 149 Cal.App.4th at p. 370), and accordingly criminalized

the act of "promot[ing], further[ing] or assist[ing] in any felonious conduct by members of [a] gang" (§ 186.22, subd. (a)). Because "a gang member who perpetrates a felony by definition promotes and furthers that same felony" (*Sanchez, supra*, 179 Cal.App.4th at p. 1307), the plain language of section 186.22, subdivision (a) would appear to reach defendants who act alone. Additionally, this view would hinge liability for street terrorism on the presence of other gang members. Such a reading would thereby exempt from section 186.22, subdivision (a) a gang member who commits a gang-motivated murder simply because he elected not to bring another gang member along. Because this result undercuts the plain reach of the statute's language and its purpose, we respectfully decline to adopt this view.

We need not go any further. Because, as noted above, Romero's conduct was proven to be gang related, we do not have to decide between the other two views because his conviction is valid under either.

*DISPOSITION*

The judgment is affirmed.

HOFFSTADT, J.\*

We concur:

GILBERT, P.J.

PERREN, J.

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\* Assigned by the Chairperson of the Judicial Council.



James P. Cloninger, Judge  
Superior Court County of Ventura

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